Possession Alone as Sufficient to Uplift the Statute of Frauds.

The explanation of the doctrine of part performance that prevails to-day is that expressed by Lord Westbury—not in connection with the doctrine of part performance, however—to the effect that the Statute of Frauds shall not be used as an instrument of fraud.[1] One line of decisions has followed this strictly and wherever there was fraud, irreparable in damages, has uplifted the statute.[2] Another line has held that coupled with fraud the act done as part performance must point to a contract of some sort before the statute is raised,[3] thus putting the jurisdiction not merely on the ground of fraud, but of evidence. While this added requirement may make the exercise of the jurisdiction more certain to work justice and less likely to allow that against which the statute was aimed, nevertheless the statute required a certain kind of evidence in order to charge the defendant, to wit: a writing, and anything other than that would seem to be clearly insufficient. Consequently, part performance, which is merely evidentiary of a contract, but which does not cause a fraud to arise, would seem to be not enough to uplift the statute.

The question arises as to what constitutes sufficient part performance to take a case without the statute, which would otherwise be within it. In a recent case under an oral promise by B that if A, his son, would support B and B's wife during their lives, A should have the property B lived on, A went into possession with B and supported B and his wife during B's life. On a bill being filed for specific performance, it was held that the possession which "was as exclusive as the terms of the contract and the circumstances admitted" and the fact that he had performed the services, together constituted sufficient part performance to take the case without the statute. *Taylor, et al.,* v. *Taylor,* 99 Pac. Rep. 814 (Kansas).

For some time mere possession by the vendee has been looked upon as sufficient part performance. In an early case it was said that inasmuch as possession was delivered according to the agreement, he [Lord Chancellor Jefferies] took the bargain to be executed,[4] but no further explanation was given. It is suggested that an equitable title was regarded as vested in the vendee by the possession and with this the first sections

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[1] *McCormick* v. *Grogan,* L. R. 4 E. & I. A. C. 82, 97 (1869).

[2] *Slingerland* v. *Slingerland,* 39 Minn. 197 (1888).

[3] *Maddison* v. *Alderson,* L. R. 8 A. C. 467 (1883).

[4] *Butcher* v. *Stapely,* 1 Vern. 363 (1685).

of the statute had nothing to do, they concerning only the creation and assignment of legal estates. But by the vesting of the equitable title a trust arose which is in terms excepted from the statute by the eighth section. Opposed to this view is that of Gibson, J., in an early Pennsylvania case, that an equitable title was vested in the vendee by the mere contract to sell without the delivery of possession, and that such an equitable estate came within the terms of the first three sections and prevented specific performance unless in writing.[5]

Under the fraud theory it has been held that mere possession is sufficient, because unless the contract could be shown by the vendee in possession, he would be a trespasser and this would be a fraud upon him. The contract being admitted for this purpose should be admissible throughout.[6] At least one jurisdiction has made mere possession sufficient by statute.[7] The contrary conclusion is reached in several jurisdictions, the reason being that while it is not contravening the statute to allow the contract to be offered in evidence as a defense against trespass, yet it would be in the very teeth of the statute to allow a defendant to be charged on a contract, even under the circumstance of the vendee in possession. There being no fraud, therefore, since the one in possession has an adequate defense to a trespass, there is no need of uplifting the statute.[8]

Those jurisdictions holding that possession is sufficient require the possession to be exclusive,[9] and it is generally held that the possession of a son with his father is insufficient, the reason being, of course, that the possession is explicable in many other ways than on the hypothesis of any contract existing between the parties.[10] The conclusion of the principal case that the possession was as exclusive as possible would seem to go farther than generally held. The mistake, it is submitted, is in starting with the thought that possession takes the case without the statute, whereas the rule is that to take the case without the statute there must be circumstances working a fraud and evidence pointing to a contract, and only where the possession is such as to satisfy these requirements is it sufficient.[11]

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[5] *Wilson* v. *Clark*, 1 W. & S. 554 (Pa. 1841).

[6] *Clinan* v. *Cooke*, 1 S. & L. 22 (1802); *Ungley* v. *Ungley*, L. R. 5 Ch. D. 887 (1877); *Andrews* v. *Babcock*, 63 Conn. 109 (1893).

[7] Iowa State Code of 1897, secs. 4625-6.

[8] *Ann Lodge* v. *Leverton*, 42 Texas, 18 (1875); *Glass* v. *Hulbert*, 102 Mass. 24, 32 (1869).

[9] *Baldwin* v. *Baldwin*, 73 Kans. 39 (1906).

[10] *Crank* v. *Trumble*, 66 Ill. 428 (1872); *Johns* v. *Johns*, 67 Ind. 440 (1879).

[11] But see *McKay* v. *Calderwood*, 37 Wash. 194 (1905).